

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN RICHARD FRATUS,

Plaintiff,

v.

BAPTISTA, et al.,

Defendants.

Case No. [14-cv-02608-JD](#)

ORDER OF SERVICE

Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. Plaintiff's complaint was dismissed with leave to amend and he has filed an amended complaint.

DISCUSSION

I. STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint "does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a

1 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above
 2 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
 3 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
 4 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
 5 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
 6 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
 7 should assume their veracity and then determine whether they plausibly give rise to an entitlement
 8 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by
 10 the Constitution or laws of the United States was violated, and (2) the alleged deprivation was
 11 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

12 **II. LEGAL CLAIMS**

13 Plaintiff states that several defendants used excessive force against him in retaliation for
 14 reporting an injury. The treatment a prisoner receives in prison and the conditions under which he
 15 is confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S.
 16 25, 31 (1993). “After incarceration, only the unnecessary and wanton infliction of pain . . .
 17 constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” *Whitley v.*
 18 *Albers*, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation and citation omitted).
 19 The core judicial inquiry is whether force was applied in a good-faith effort to maintain or restore
 20 discipline, or maliciously and sadistically to cause harm. *Whitley*, 475 U.S. at 320-21.

21 “Within the prison context, a viable claim of First Amendment retaliation entails five basic
 22 elements: (1) an assertion that a state actor took some adverse action against an inmate (2)
 23 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
 24 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
 25 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).
 26 *Accord Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under §
 27 1983 for retaliation must allege that he was retaliated against for exercising his constitutional
 28 rights and that the retaliatory action did not advance legitimate penological goals, such as

preserving institutional order and discipline).

In the prior screening order (Docket No. 6) the Court found that plaintiff had stated a claim against defendants Baptista and Beers for excessive force when they sprayed him with pepper spray. The remaining supervisory defendants were dismissed with leave to amend to provide more information. The only additional defendant mentioned in the amended complaint is Sergeant Johnson, and plaintiff alleges that he was present during the last portion of the pepper spray incident and helped the defendants cover up the incident and destroyed evidence. Plaintiff provides no other information regarding his involvement or how he aided in a cover up. These allegations are insufficient to state a claim against Johnson and he is dismissed from this action. Plaintiff also alleges that Baptista and Beers used excessive force in retaliation for plaintiff reporting a back injury he suffered from a prior incident with the defendants. Plaintiff alleges that Baptista called him a “rat” and asked how his back was feeling prior to using the pepper spray. This is sufficient to allege a retaliation claim against these defendants.

CONCLUSION

1. All defendants are **DISMISSED** from this action except for Baptista and Beers.
2. The clerk shall issue a summons and the United States Marshal shall serve, without prepayment of fees, copies of the amended complaint with attachments and copies of this order on the following defendants: correctional officer Baptista and Beers at Pelican Bay State Prison.
3. In order to expedite the resolution of this case, the court orders as follows:
 - a. No later than sixty days from the date of service, defendant shall file a motion for summary judgment or other dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the court prior to the date his summary judgment motion is due. All papers filed with the court shall be promptly served on the plaintiff.
 - b. At the time the dispositive motion is served, defendant shall also serve, on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154 F.3d 952, 953-

954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).
See Woods v. Carey, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand* and *Wyatt* notices must be
 given at the time motion for summary judgment or motion to dismiss for nonexhaustion is filed,
 not earlier); *Rand* at 960 (separate paper requirement).

c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
 the court and served upon defendant no later than thirty days from the date the motion was served
 upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is
 provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc),
 and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

If defendant files a motion for summary judgment claiming that plaintiff failed to exhaust
 his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take
 note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided
 to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

d. If defendant wishes to file a reply brief, he shall do so no later than fifteen
 days after the opposition is served upon him.

e. The motion shall be deemed submitted as of the date the reply brief is due.
 No hearing will be held on the motion unless the Court so orders at a later date.

4. All communications by plaintiff with the court must be served on defendant, or
 defendant's counsel once counsel has been designated, by mailing a true copy of the document to
 defendants or defendants' counsel.

5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
 No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the
 parties may conduct discovery.

6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
 informed of any change of address by filing a separate paper with the clerk headed "Notice of
 Change of Address." He also must comply with the court's orders in a timely fashion. Failure to

do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of
 Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: March 9, 2015

JAMES DONATO
United States District Judge

United States District Court
Northern District of California

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact-- that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/9/2015, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Richard Fratus
V74577
P.O. Box 290066
Represa, CA 95671

Dated: 3/9/2015

Richard W. Wieking
Clerk, United States District Court

By:  _____
LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO